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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO.483 OF 2007

Bombay Ammonia & Chemical Co. Petitioner
versus
Shree Mantralayam Chemical Inds. Pvt.Ltd. Respondent

C.N.Mehta for petitioner.
Pradeep Bakhru i/by Divya Shah Asso. for Respdt.

CORAM : A.M.KHANWILKAR, J.

DATE : 10th December 2007

PC :

1. Heard counsel for the parties. Perused the relevant pleadings and documents on record. The respondents intended to submit reply affidavit. However, that request was not accepted in view of the order passed on 30th November 2007. Accordingly, arguments of petitioner for admission proceeded on the basis of documents already on record.

2. The petitioner’s claim is in respect of four different items. The claim towards first three items pertain to the goods sold, delivered and

supplied. Insofar as item nos.1 and 2 of the particulars of claim are in relation to invoice numbers 379 dated 3rd June 2006 and 417 dated 11th June 2006. The third claim is in respect of dishonoured cheque dated 24th July 2006 in sum of Rs.32,123/-. Insofar as the claim with regard to first two items, the stand of the respondent company, as can be discerned from the reply given to the statutory notice, is that the respondent was over-charged as set out in paragraph 5 of the said reply-for which the respondent was entitled for adjustment of accounts and in fact would be entitled to receivet Rs.8,600/- from the petitioner. Except this stand taken in the reply to the statutory notice, there is no contemporaneous record to indicate that the respondent had raised such grievance soon after the goods were sold, delivered and supplied. There is nothing on record to support that position. Thus understood, the plea taken by the respondent in the reply to the statutory notice is only to create gloss. The defence is palpably frivolous.

3. Insofar as item no.3 in the particulars of claim relating to cheque no.161615 dated 24th July 2006 in the sum of Rs.32,123/- is concerned,

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the case of the petitioner is that the said amount was offered in relation to the outstanding dues pertaining to old invoices and not the invoices referred in items 1 and 2 of the particulars of claim. Even the statutory notice asserts this position. The respondent has replied to the statutory notice and has asserted that in fact the respondent was entitled to recover a sum of Rs.8,600/- from the petitioner being surplus payment made by the respondent. The respondent has also asserted that there is nothing on record to show that the amount referred to in the cheque dated 24th July 2006 in fact pertained to old invoices. According to the respondent, the parties were maintaining running account and the respondent made payment on the basis of such account.

4. The fact remains that the respondent admitted the liability in relation to amount of Rs.32,123/-. The said cheque has been dishonoured. It is not the case of the respondent that the respondent made good the said amount at a later point of time. To get over this position perhaps the stand taken on behalf of the respondent is that the petitioners charged excessively and the respondent would be entitled

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to receive payments from the petitioner. As already mentioned earlier, this stand is after thought and taken to create gloss. The said stand taken by the respondent comes for the first time in the reply sent through the advocate. There is no contemporaneous record to support that plea taken by the respondent. Thus understood, it will have to be assumed that the respondent is not only liable to pay a sum of Rs.32,123/- towards dishonoured cheque which pertain to admitted liability of the respondent in respect of goods sold, delivered and supplied in the past but also further sum of Rs.30,969/- in relation to invoice nos.379 and Rs.50,485/- in relation to invoice no.417, as claimed by the petitioner. The respondent has not produced the relevant extracts of books of account to controvert this position. The liability of the petitioners in respect of first three debts itself exceeds a sum of Rs.70,000/-. That is much more than the statutory amount in the sum of Rs.500/-, sufficient to initiate an action against the respondent company by way of present petition.

5. Insofar as item no.4 referred to in the particulars of claim is in respect of 18

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cylinders. According to the petitioners, the value of 18 cylinders which were required to be returned by the respondent, would be Rs.1,44,000/- (i.e. 18xRs.8,000/- each). The respondent in the reply sent to the statutory notice has denied any liability to pay such amount or return 18 empty cylinders as claimed by the petitioners. According to the respondents, the respondent has returned all the empty cylinders. It is further asserted that the petitioners had supplied 10 cylinders under Delivery Challan No.274 but the petitioners took away said 10 cylinders without giving any intimation to the respondent from the premises of the respondent. According to the respondent, no complaint has been registered in respect of this act of the petitioner, as parties had cordial business relations in the past and the respondent did not anticipate such legal action.

6. The respondent’s case is that 10 cylinders have been taken away on 12th June 2006. It is too much to assume that the respondent would remain silent and would not register any protest in respect of those 10 cylinders being taken away by the petitioners. Even this defence taken by the respondent is after thought and has come for

the first time in the reply sent through advocate. No contemporaneous record has been produced by the respondent to support this claim. In my opinion, atleast to the extent of 10 cylinders, the explanation of the respondent will have to be discarded. It will, therefore, have to be concluded that the respondent will have to make good that amount. However, the basis on which the value of the cylinders has been arrived at by the petitioner is not forthcoming. The respondent is disputing the value of the cylinders referred to by the petitioner in particulars of claim. Besides, it is contended by the respondent that it will be a claim of liquidated damages against the respondent. To that extent, the respondent may be justified.

7. But the fact remains that the explanation offered by the respondent with regard to the first three items of the particulars of claim is unacceptable. As the amount involved is more than the statutory amount and the respondent company has failed and neglected to pay that amount in spite of statutory notice but has chosen to take a plea which is frivolous, it necessarily follows that the respondent is unable to pay its dues. On this finding, the petition

deserves to be admitted.

8. However, I proceed to pass following conditional order :-

(a) The respondent shall deposit a sum of Rs.75,000/- (Rs.Seventy five thousand only) in this Court within two weeks from today, failing which the petition shall stand admitted in which case, the petitioners will be free to advertise admission of the petition by publication;

(b) In the event the respondent deposits the amount within the specified time, the petitioners will be free to withdraw the said amount on giving an undertaking that in the event the respondent company files any suit for declaration or any other appropriate relief in the context of two invoices and the cheque referred at item nos.1 to 3 of the particulars of claim, the amount so withdrawn will be subject to those proceedings and the petitioner will be liable to bring back such amount as may be ordered in those proceedings including the direction in relation to the interest, if any, on such amount;

(c) In case the petitioner is required to

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advertise the petition, that be done in two local newspapers, namely, "Free Press Journal", "Navshakti" and in the Maharashtra Government Gazette. The petitioner shall deposit an amount of Rs.10,000/- (Rs.Ten Thousand only) with the Registrar (O.S.)/ Prothonotary & Senior Master towards the publication charges within three weeks after the expiry of two weeks granted to the respondent to deposit, with intimation to the Company Registrar, failing which the petition shall stand dismissed for non prosecution without further reference to the Court;

9. On amount being deposited in time, the petition shall stand disposed of with liberty to the petitioner to pursue appropriate remedy with regard to the claim in relation to value of cylinders, which proceedings will be decided on its own merits in accordance with law.

(A.M.KHANWILKAR, J.)